

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Annual Assessment of the Status of
Competition in the Markets for the
Delivery of Video Programming

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) CS Docket No. 00-132
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REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc.¹ ("DIRECTV") hereby submits the following reply comments in response to selected issues raised by commenters in the above-captioned proceeding.

First, DIRECTV reiterates its concern that the program access law² must be enforced more aggressively in order to facilitate increased competition in the delivery of multichannel video programming. Overwhelmingly, the parties agree with DIRECTV that recent Cable Services Bureau decisions jeopardize the effectiveness of the program access law and the Commission's program access implementing rules. The parties also agree that it would be premature for the Commission to permit the program access rules to sunset. They join DIRECTV in urging the Commission instead to strengthen the rules and their enforcement to prevent cable operators from migrating satellite cable programming to a terrestrial mode of delivery.

Second, DIRECTV wishes to address the comments of EchoStar Satellite Corporation ("EchoStar") with respect to allegations of "unfair practices" by DIRECTV. As EchoStar concedes, this proceeding is not the appropriate forum to evaluate claims that are the subject of a

¹ DIRECTV is a wholly owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² 47 U.S.C. § 548.

lawsuit in federal district court.³ Moreover, there is no legal or policy basis for the Commission to extend the “unfair practices” provision of the program access law to encompass exclusive programming agreements involving “all MVPDs.” Thus, DIRECTV requests that the Commission disregard EchoStar’s comments on this specific issue.

I. THE COMMISSION MUST PRESERVE THE PROGRAM ACCESS LAW

An overwhelming majority of commenters share DIRECTV’s concern that the Cable Services Bureau’s recent decisions have encouraged the practice of “terrestrial evasion” of the law.⁴ In particular, many parties express concern that increased consolidation in the cable industry combined with lower prices for fiber capacity have made it easier for cable operators to engage in anticompetitive tactics. Some commenters have experienced first-hand the effects of “terrestrial evasion” of the program access law.⁵ At least one new competitor fears similar consequences: Comcast – the same vertically-integrated cable operator that has engaged in terrestrial evasion in the past – has purchased the regional sports network serving the Baltimore market.⁶ The Commission must not allow these practices to continue to thwart competition.

³ Comments of EchoStar Satellite Corporation at 9.

⁴ *See, e.g.*, Comments of DIRECTV at 7-9; Comments of American Broadband, Inc., at 9-10; Comments of BellSouth Corporation, BellSouth Entertainment, Inc., BellSouth Interactive Media Services, Inc., and BellSouth Wireless Cable, Inc., at 7-8 (“Comments of BellSouth”); Comments of RCN Corporation at 16-18; Comments of the Wireless Communications Association, International at 8-10.

⁵ Comments of DIRECTV at 14-16; Comments of RCN Corporation at 12-24.

⁶ Comments of American Broadband, Inc. at 10.

In addition, the commenters share DIRECTV's view that the Commission must not allow the program access law to sunset.⁷ In fact, of the many issues the Commission raised in its Notice of Inquiry, it is clear that the possible expiration of the program access law and terrestrial evasion were the issues of greatest concern to the majority of the commenters – ranging from start-up companies to established MVPDs attempting to compete with cable incumbents. Despite the progress that has been achieved thus far, cable continues to dominate the MVPD market. At least one commenter notes that the cable industry is now *more concentrated* than it was when Congress enacted the program access law.⁸ Many commenters note that cable operators continue to deny their competitors access to critical programming.

There is no question that the program access law must be maintained. The only question is what the Commission should do to close the loopholes. In crafting its notice concerning the possible sunset of the program access rules, DIRECTV urges the Commission to consider the overwhelming response to these issues by the commenters in this proceeding. Further dilution of this critical safeguard could threaten the progress that cable competitors have made in the MVPD market thus far.

II. THERE IS NO LEGAL OR POLICY BASIS FOR APPLYING CABLE PROGRAM ACCESS RULES TO NON-CABLE MVPDS WITH NO MARKET POWER

In its Comments in this proceeding, EchoStar includes an ill-conceived attempt to persuade the Commission to extend the “unfair practices” provision of the program access law,

⁷ See, e.g., Comments of DIRECTV at 15-16; Comments of American Broadband, Inc., at 9-10; Comments of BellSouth at 7-8; Comments of RCN Corporation at 30-32; Comments of the Wireless Communications Association, International at 3-4.

⁸ Comments of the Wireless Communications Association, International at 7.

47 U.S.C. § 548(b), to encompass exclusive programming agreements involving all “MVPDs,”⁹ regardless of whether such agreements involve a cable operator or a vertically integrated programming supplier, and even in the case of MVPDs that lack market power. In short, EchoStar would have the Commission prohibit *any* MVPD exclusive agreement, with the design of sweeping into the law's ambit DIRECTV's current exclusive arrangements with various sports leagues.¹⁰

Ironically, DIRECTV agrees with EchoStar that Section 628(b) should be utilized more aggressively by the Commission to police the unfair practices of cable operators and vertically integrated cable programming vendors – for example, the practice of switching from satellite to terrestrial delivery in order to avoid application of the program access rules.¹¹ However, DIRECTV is neither a cable operator nor a programming supplier that is vertically integrated with a cable operator, and neither are the sports leagues. Without some cable nexus, there is simply no statutory basis for the law to apply.

From a policy perspective, this result makes perfect sense. The program access law was designed to prevent cable monopolists and their vertically integrated programming affiliates

⁹ Comments of EchoStar Satellite Corporation at 9.

¹⁰ *Id.* DIRECTV notes that these exclusive arrangements are only for DIRECTV to be the exclusive “small dish” supplier of sports programming. They do not prevent other segments of the MVPD industry, such as cable operators, from gaining access to these programs.

¹¹ *Id.* at 8.

from using their market power to deny emerging MVPDs access to programming.¹² The Commission recognized that in the hands of cable incumbents wielding tremendous market power, ordinary business practices such as exclusivity could become extraordinary weapons of unfair competition. At the same time, the program access law was intended to affirmatively promote competition to cable operators from emerging MVPD competitors such as DBS providers. Thus, although Congress could have chosen to draft the law more broadly, it did not do so; the law by its terms does not reach all MVPD exclusive arrangements *precisely* because Congress and the Commission recognized that the types of exclusive arrangements that DIRECTV has pursued are pro-competitive, and permit alternative MVPDs to establish and differentiate themselves in the MVPD marketplace.¹³

Even in instances where a cable operator is involved on one side of the transaction, the Commission repeatedly has refused to apply Section 628(b) to exclusive arrangements with non-vertically integrated programmers, reasoning that such contracts in general are legitimate commercial practices permitted by the Communications Act, and that “based on the

¹² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order, 12 FCC Rcd 22840, 22841-42 (1997); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3365-67 ¶¶ 21-22 (1993).

¹³ Antitrust cases concerning exclusive dealing agreements between non-dominant firms and content suppliers consistently find that such agreements are procompetitive because they facilitate product differentiation. *See, e.g., Paddock Publications v. Chicago Tribune*, 103 F.3d 42, 45 (7th Cir. 1996) (exclusive dealing agreement whereby New York Times content sold to the Chicago Tribune was lawful because “exclusive stories and features help newspapers differentiate themselves, the better to compete with one another.”); *Ralph C. Wilson v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1367 (9th Cir. 1986) (Sneed, J., concurring) (exclusive contract between television programmers and television stations promote diversity in station offerings).

Communication's Act's treatment of exclusive contracts, we cannot consider such contracts a new or 'additional type of conduct' that 'may emerge as a barrier to competition' that the Commission may prohibit through Section 628(b)."¹⁴ Whether or not this analysis should obtain in all cases involving cable exclusives with non-vertically integrated programmers may be a question worth asking.

There can be *no* basis under the program access rules, however, for questioning an exclusive contract between a non-cable MVPD with no market power¹⁵ and a non-vertically integrated program supplier. The program access law reflects the well established principle that exclusive dealing arrangements are only problematic to the extent that they create or enhance market power.¹⁶ And the Commission has made it very clear that cable companies and only cable companies possess market power. Accordingly, there is no statutory or public policy basis for restricting other non-cable MVPDs – which lack market power – from entering into exclusive arrangements.

EchoStar is a successful DBS operator with full-CONUS spectrum assets greater than those of DIRECTV and is perfectly free to pursue its own differentiation strategies in the marketplace. Even if there were a statutory basis for doing so (which there is not), turning rules

¹⁴ *Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportschannel, and Bresnan Communications*, Memorandum Opinion and Order, 14 FCC Rcd 10500, 10502 (rel. July 1, 1999) (citing *Program Access Report and Order*, 8 FCC Rcd at 3374).

¹⁵ The Commission has found repeatedly that DIRECTV has no MVPD market power. *See, e.g., Tempo Satellite, Inc. and DIRECTV Enterprises, Inc., Application for Consent to Assign Authorization to Construct, Launch and Operate a Direct Broadcast Satellite System*, Order and Authorization, 14 FCC Rcd 7946, 7953-55 (1999); *United States Satellite Broadcasting Co., Inc., and DIRECTV Enterprises, Inc., Application for Transfer of Control of the USSB II, Inc. Authorization to Operate a Direct Broadcast Satellite System*, Order and Authorization, 14 FCC Rcd 4585, 4590-91 (1999).

¹⁶ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

designed to curb the market power of incumbent cable providers back on emerging competitors for short-term parochial gain is not in the public interest, and will not promote MVPD competition – especially in a world in which cable operators continue to have a dominant 82% share of the MVPD market.¹⁷

The Commission should dismiss EchoStar's position.

III. CONCLUSION

The comments submitted by parties in this proceeding focus on the possible sunset date of the program access law and the tactics cable operators have employed in order to avoid application of the Commission's rules implementing this law. Above all, the comments make clear that the program access law remains integral to MVPD competition. Accordingly, DIRECTV urges the Commission to strengthen the program access law rather than allow it to sunset.

Respectfully submitted,

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¹⁷ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, 981 (2000).